SUPREME COURT, U. S.

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Supreme Court of the United States

October Term, 1974

No. 74-403

SAMUEL J. JORDON, *et al.*,

Petitioners,

vs.

JOHN J. GILLIGAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS

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Respondents are the State of Ohio, through John J. Gilligan, Governor; Joseph T. Ferguson, State Auditor; Ted W. Brown, Secretary of State; Anthony O. Calabrese, Sr., State Senator; and Robert A. Manning, State Representative, collectively, in their official capacities, and as persons responsible for apportioning the State of Ohio. Although respondents believe the decision of the Sixth Circuit Court of Appeals in this case is correct and in conformity with *Edelman v. Jordan*, 415 U.S. 651 (1974), respondents do not oppose the allowance of a writ of certiorari in this case for the following reasons:

1. Whether the Eleventh Amendment bars an award of attorneys' fees against the State of Ohio is now

ripe for review since there is a conflict among the circuits.

2. The question raised herein is undoubtedly of such importance as to require a Supreme Court determination on the merits.

I. CONFLICT AMONG THE CIRCUITS

A. Decisions holding awards of attorneys' fees barred by the Eleventh Amendment.

Subsequent to the decision of the instant case by the Sixth Circuit Court of Appeals, another panel from that court followed this decision stating:

> "The propriety of an award of attorneys' fees by a federal court against a state or its officials acting in their official capacity has been settled in this Circuit by our recent holding in *Jordon v. Gilligan*, 500 F.2d 701 (6th Cir. 1974), that such an award is barred by the Eleventh Amendment." *Taylor v. Perini*, 503 F.2d 899, 901 (6th Cir. October 3, 1974), *petition for cert. filed* (U.S. October 30, 1974, No. 74-506).

The Third Circuit Court of Appeals in *Skehan v. Board of Trustees*, 501 F.2d 31 (3d Cir. May 3, 1974) *petition for cert. filed* (U.S. Nov. 8, 1974) vacated and remanded the decision of the district court for a determination of whether Bloomsburg State College was an agency of the Commonwealth of Pennsylvania. The Third Circuit then directed:

> "[I]f the court should find that the college is covered by the Commonwealth's state sovereign immunity neither backpay nor attorney fees could be awarded." *Skehan v. Board of Trustees of Bloomsburg State College*, 501 F.2d at 45.

Likewise, a panel of the Fifth Circuit Court of Appeals held:

> "It is apparent that any award for attorneys' fees must be paid from the general revenues of the State of Texas. Under the *Edelman* rationale 'the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.' footnote 12. *Edelman, supra,* 415 U.S. at 663, 94 S. Ct. at 1356. Cases in which attorneys' fees were awarded because of bad faith or obdurate obstinacy, or under the private attorney general theory against nonstate defendants, are clearly inapposite. The claim for attorneys' fees, even if limited to services through the first appeal of this case, is, therefore, barred." *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department,* 496 F.2d 1017, 1026 (5th Cir. 1974) (rehearing en banc granted).

B. Decisions upholding awards of attorneys' fees.

In *Jordan v. Fusari,* 496 F.2d 646 (2d Cir. 1974), the Second Circuit held that the Eleventh Amendment did not bar an award of attorneys' fees from a state treasury. See also, *Class v. Norton,* ..... F.2d ..... (No. 74-1702 2d Cir. October 10, 1974).

Likewise, in *Brandenburger v. Thompson,* 494 F.2d 885, 888 (9th Cir. 1974), the Ninth Circuit concluded that:

> "An award of attorneys' fees assessed against a state official acting in his or her official capacity is not proscribed by the Eleventh Amendment."

In *Gates v. Collier,* 489 F.2d 298 (5th Cir. 1973) (rehearing en banc granted), a panel of the Fifth Circuit

upheld an award by the district court of attorneys' fees and expenses to plaintiffs' counsel which were taxed as costs against the State of Mississippi and payable from funds which the Mississippi legislature might appropriate for the operation of the Mississippi State Penitentiary. The Fifth Circuit noted that although attorneys' fees and expenses could have been assessed against the individual defendants, the award was not vitiated by virtue of the fact that it was to be paid from the state treasury. The Fifth Circuit has since ordered a rehearing en banc of *Gates v. Collier, supra* and *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, supra.*

In view of the conflict among the circuits concerning the question of whether the Eleventh Amendment bars the award of attorneys' fees from a state treasury, respondents will not discuss the numerous conflicting district court decisions on this subject.

II. IMPORTANCE OF CONSTITUTIONAL QUESTION

There should be no mistaking the significance of this case since the issue of the liability of states and state officials for attorneys' fees is arising with growing frequency. This case is significant because it squarely presents the question of a state's immunity from awards of attorneys' fees. While this court had previously entered a summary affirmance of *Sims v. Amos,* 340 F. Supp. 691 (M.D. Ala.) *aff'd per curiam,* 409 U.S. 942 (1972), the district court there treated the Eleventh Amendment defense only in a footnote. 340 F. Supp. at 694 n. 8. In the instant case, the Sixth Circuit Court of Appeals concluded that the summary affirmance of *Sims v. Amos* did not

constitute controlling precedent on the Eleventh Amendment issue herein. The Sixth Circuit Court of Appeals stated:

> "Mr. Justice Rehnquist, writing for a majority of the Court, touched upon the validity of summary affirmances:
>
> > 'Shapiro v. Thompson and these three summary affirmances [see footnotes 11 & 12 and accompanying text] obviously are of precedential value in support of the contention that the Eleventh Amendment does not bar the relief awarded by the District Court in this case. Equally obviously they are not of the same precedential value as would be an opinion of this Court treating the question on the merits.' Edelman, supra, 94 S.Ct. at 1359.
>
> "This position is in accordance with the views of the commentators:
>
> > 'While per curiam affirmances by the Supreme Court have been held to be binding precedents in later cases in the lower courts, they have so frequently proved to be such a shaky guide to the outcome of later full-dress considerations, that in many decisions in the district courts and courts of appeals they have received but scant attention.' 1B J. Moore, Federal Practice §0.402[2] (1973 Supp. at pp. 13-14)." *Jordan v. Gilligan*, 500 F.2d 701, 707-8 (6th Cir. July 18, 1974).

In the instant case alone, the district court awarded $27,272.65 of attorneys' fees and expenses to be paid by the State of Ohio. A petition for writ of certiorari is presently pending in another case where a district court awarded $21,055.07 of attorneys' fees and expenses to be paid by the State of Ohio in a similar case. See, *Taylor*

v. Perini, 503 F.2d 899 (6th Cir. October 3, 1974), *petition for cert. filed* (U.S. October 30, 1974, No. 74-506).

Obviously, the fiscal impact of this decision will be substantial.

III. CONCLUSION

For the above reasons, respondents do not oppose the issuance of a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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